

SERVICE DATE - AUGUST 1, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32759

GENESEE & WYOMING, INC.—CONTROL
EXEMPTION—PORTLAND & WESTERN RAILROAD, INC.

Decided: July 22, 1997

Genesee & Wyoming, Inc. (GWI),² filed a petition for exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343-45 to continue in control of its noncarrier subsidiary, Portland & Western Railroad, Inc. (PNWR), upon PNWR's becoming a carrier pursuant to the related transaction in *Portland & Western Railroad, Inc.—Lease and Operation Exemption—Southern Pacific Transportation Company*, Finance Docket No. 32758 (ICC served Sept. 13, 1995) (*Portland*). To permit PNWR to consummate the lease transaction and commence operations without GWI's obtaining unlawful control, GWI placed PNWR's stock in an independent voting trust,³ pending a decision on the merits in this proceeding. A confidential copy of the voting trust agreement was filed under seal.

John D. Fitzgerald, representing the United Transportation Union, General Committee of Adjustment for lines of Burlington Northern Railroad Company (UTU-GCA), appealed the ICC's

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323-24. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² GWI filed its petition under the name Genesee & Wyoming Industries, Inc. It subsequently notified us by letter that it had changed its name to Genesee & Wyoming, Inc.

³ The voting trust agreement specifies a termination date no later than January 15, 1996, but provides for extensions by mutual consent of the parties. We assume that the voting trust did not terminate on January 15, 1996. Under 49 CFR 1013.2, voting trusts should remain in effect until certain events, specified in the trust, occur. For example, the trust might remain in effect until all of the deposited stock is sold to a person not affiliated with the settlor or the trustee receives a Board decision authorizing the settlor to acquire control of the carrier or authorizing the release of the securities.

acceptance of the voting trust agreement under seal.⁴ The Railway Labor Executives' Association, United Transportation Union, and Brotherhood of Locomotive Engineers also filed requests for employee protective conditions. We are granting GWI's petition for an exemption to control PNWR, in addition to the rail carriers it already controls, subject to standard labor protective conditions.⁵

BACKGROUND

GWI's petition for exemption was filed simultaneously with PNWR's *Portland* filing, a verified notice of exemption under 49 CFR 1150 subpart D—*Exempt Transactions*, to lease from Southern Pacific Transportation Company (SPT) and operate three interconnected branch lines and 3.69 miles of incidental overhead trackage rights, all in the State of Oregon. The three branch lines (Willsburg Jct.-Schefflin, Hillsboro-Seghers, and Cook-Newberg) extend approximately 52.68 miles and are connected via the trackage rights at Willsburg Jct. to SPT's Brooklyn Yard at Portland, OR. PNWR was scheduled to commence operations on or about August 15, 1995, the date the notice in *Portland* became effective.

At the time this petition for a control exemption and PNWR's notice of exemption in *Portland* were filed, GWI controlled through stock ownership the Willamette & Pacific Railroad, Inc. (W&P),⁶ and eight other Class III railroads.⁷ Because the lines in *Portland* connect at Newberg

⁴ GWI responded to UTU-GCA arguing that: (1) it is not a party and, thus, lacks standing to file an appeal; (2) there is no written decision to appeal; and (3) the acceptance of the filing under seal does not constitute exceptional circumstances such as would require correction because of a clear error of judgment or to prevent manifest injustice. GWI also agreed to give UTU-GCA a copy of the voting trust agreement, subject to an appropriate confidentiality agreement or a stipulated protective order.

Under 49 CFR 1104.14, confidential materials must be labeled and filed separately and requests to keep them confidential must be submitted separately and must be clearly headed "Motion for protective order." GWI submitted the voting trust agreement as a confidential document in a separate envelope but failed to request a protective order. The ICC accepted the voting trust agreement under seal and informally segregated it pending the filing of a protective order.

The failure to request a protective order for a document filed under seal does not preclude us from granting access to the document. However, we need not do so here because GWI has agreed to make the voting trust agreement available, subject to appropriate safeguards. Accordingly, we will deny the appeal.

⁵ While GWI petitioned for an exemption for it to continue in control of PNWR when PNWR became a rail carrier, in view of the fact that PNWR is now a carrier with its stock held in an independent voting trust, our exemption would permit GWI to assume control over PNWR rather than to continue in control of PNWR. From the time PNWR became a carrier until the effectiveness of the exemption we are granting in this decision, GWI could not lawfully exercise control over PNWR. We have revised the title of the proceeding accordingly.

⁶ See *Genesee & Wyoming Industries, Inc.—Continuance In Control Exemption—Willamette & Pacific Railroad, Inc.*, Finance Docket No. 32246 (ICC served Feb. 26, 1993), *petition to revoke denied* (ICC served Sept. 7, 1995).

⁷ The eight railroads are: Genesee & Wyoming Railroad Company; Dansville and Mount Morris Railroad Company; Rochester & Southern Railroad, Inc.; Louisiana & Delta Railroad, Inc.; Buffalo & Pittsburgh Railroad, Inc.; Bradford Industrial Rail, Inc.; Allegheny & Eastern Railroad Inc.; and GWI Switching Services.

with lines that were already being leased and operated by W&P,⁸ GWI filed this petition for exemption instead of a notice under the class exemption at 49 CFR 1180.2(d)(2).

In February 1993, when W&P commenced operating the lines under the exemption in *Willamette*, it assertedly planned to move all traffic south to SPT's Eugene Yard. However, some of the traffic could not be routed to the Eugene Yard because it originated above a portion of the leased line that required rehabilitation. To move this traffic, W&P entered into a temporary detour agreement (TDA) with SPT giving it access to the Brooklyn Yard via Newberg-Cook-Willsburg Jct.

According to GWI, the volume of traffic that was being routed northwest of the Brooklyn Yard through the Portland Gateway via Newberg-Cook-Willsburg Jct. exceeded W&P's projections.⁹ However, safety concerns allegedly caused SPT to take the western end of the Newberg-Cook segment out of service on August 19, 1994. GWI states that SPT was unwilling to incur the cost of rehabilitation because of the lack of traffic originating and/or terminating on the line.¹⁰

In order to retain its traffic through the Portland Gateway, W&P began routing shipments via Eugene, a substantially more circuitous route. W&P's round trip mileage increased from 80 miles via the Brooklyn Yard to 347 miles via Eugene, and freight cars that had previously moved through one yard now moved through three.

The exemption in *Portland* in combination with this control transaction reestablishes a direct overhead connection between W&P's lines and SPT's Brooklyn Yard via Newberg-Cook-Willsburg Jct.¹¹ According to GWI, this route also has the potential for additional overhead traffic.

Although PNWR is expected to operate profitably, notwithstanding the substantial rehabilitation that is necessary on the leased lines, GWI states that PNWR was formed as a new subsidiary because it was deemed more prudent to protect the other railroads in the corporate family from the risks of the new operation.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11343, the acquisition of control of a carrier by a person that controls any number of other carriers requires our prior approval. Thus, our approval is required for GWI to dissolve the voting trust and acquire control of PNWR. However, under 49 U.S.C. 10505, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not

⁸ The lines consist of 6 branches, totaling approximately 183.82 miles and extending from Newberg at the northernmost point to Monroe at the southernmost point. In addition to the leased lines, W&P acquired, as part of that same transaction, 41.2 miles of incidental trackage rights between Albany and SPT's Eugene Yard. *See Willamette & Pacific Railroad, Inc.—Lease and Operation Exemption—Southern Pacific Transportation Company*, Finance Docket No. 32245 (ICC served Feb. 26, 1993), *petition to revoke denied* (ICC served Sept. 7, 1995) (*Willamette*).

⁹ Before starting operations in 1993, W&P projected that its annual traffic volume would reach 28,500 carloads. The actual figures for 1994 were approximately 35,000 carloads. While it is not stated how much of this traffic moved through the Portland Gateway, W&P apparently acquired access to 17 new shippers that routed their traffic exclusively via that gateway. Also, Cascade Rolling Mills, W&P's second largest shipper, initiated two new traffic flows to that routing and Purina Mills and W&P were jointly planning track changes at the shipper's McMinnville facility to permit increased production and use of rail service via the Portland Gateway.

¹⁰ While W&P was operating the Newberg-Cook-Willsburg Jct. line under the TDA, SPT apparently was providing limited local service to two shippers located between Sherwood and Cook.

¹¹ PNWR was to rehabilitate and operate the three SPT lines and to enter into a haulage agreement with W&P to handle its traffic between Newberg and Brooklyn Yard.

necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed transaction is not necessary to carry out the rail transportation policy. An exemption will minimize the need for Federal regulatory control over this transaction and reduce regulatory barriers to entry [49 U.S.C. 10101a(2) and (7)]; foster sound economic conditions in transportation and ensure effective coordination between carriers [49 U.S.C. 10101a(5)]; and encourage efficient management [49 U.S.C. 10101a(10)]. Other aspects of the rail transportation policy are not affected adversely. For example, approval of the transaction will ensure that a sound rail transportation system will continue to meet the needs of the shipping public [49 U.S.C. 10101a(4)].

Regulation of the transaction is not needed to protect shippers from the abuse of market power. There is little likelihood that this transaction will result in the abuse of market power as it concerns GWI's acquisition of control over PNWR. Although the leased lines of PNWR connect with the leased lines of W&P, each carrier will continue to serve its respective customers and control by GWI will not result in a reduction in service or competitive alternatives for the shippers of either PNWR or W&P. Nor will it expose them to market abuses. To the contrary, the added resources made available by this control transaction, along with the lease and operation exemption in *Portland*, will create new and expanded service options for shippers. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

Under 49 U.S.C. 10505(g)(2), we may not use our exemption authority to relieve carriers, or persons in control of carriers, of their statutory obligation under 49 U.S.C. 11347 to protect the interests of employees. The employee protective conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), have been found applicable to control transactions, and we will impose them here.

The control transaction is exempt from the environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because it will not result in any significant changes in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 CFR 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The appeal of the acceptance of the voting trust agreement under seal is denied.
2. Under 49 U.S.C. 10505, GWI is exempted from the prior approval requirements of 49 U.S.C. 11343-45, to control PNWR, subject to the employee protective conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).
3. Notice will be published in the *Federal Register* on August 1, 1997.
4. This decision is effective on August 31, 1997.
5. Petitions for stay must be filed by August 11, 1997, and petitions to reopen must be filed by August 21, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary